

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

COZEN O'CONNOR, P.C.,

Plaintiff,

v.

JENNIFER J. TOBITS and  
DAVID M. FARLEY and  
JOAN F. FARLEY, h/w,

Defendants.

Case Number 2:11-cv-00045

Judge: C. Darnell Jones, II

**JENNIFER TOBITS'S NOTICE OF SUPPLEMENTAL AUTHORITIES**

Jennifer Tobits respectfully submits this notice of supplemental authority relating to the Court's October 27, 2011 Order requesting briefing on the constitutionality of DOMA. Dkt. No. 55. Ms. Tobits argues that DOMA, by its plain terms, does not apply to the Cozen O'Connor Profit Sharing Plan since the plan is controlled by contract law principles and contains its own definition of the term "spouse." Dkt. No. 73 at 5. Even if the Plan were ambiguous in some way, the doctrine of constitutional avoidance requires the Court to exhaust every other reasonable construction of the statute to avoid adopting a construction that would raise serious constitutional issues. *Id.* If the Court nonetheless determines that DOMA applies to the Plan, as Cozen and the Farleys urge, DOMA violates both the equal protection and due process guarantees of the United States Constitution. *Id.* at 6-33. Ms. Tobits argues that DOMA is subject to, and fails, heightened scrutiny because it discriminates on the basis of sex and sexual orientation, but that the law fails even rational basis review. *Id.*

The recent First Circuit Court of Appeal decision, *Massachusetts v. U.S. Dept. of Health and Human Services*, 2012 WL 1948017 (1st Cir. May 24, 2012), supports Ms. Tobits's arguments. The

First Circuit determined that DOMA should be subject to a more searching rational basis review in light of its impact on minority interests and its federalism concerns: “We conclude, without resort to suspect classifications or any impairment of *Baker*, that the rationales offered do not provide adequate support for section 3 of DOMA...If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress’ will, this statute fails that test.” *Id.* at \*10.

In addition, on May 24, 2012, a decision in *Dragovich v. United States Dept. of the Treasury*, 2012 WL 1909603 (N.D. Cal. May 24, 2012) was also issued. In *Dragovich*, the court analyzed whether DOMA violates the U.S. Constitution in a case involving plaintiffs’ participation in a long-term care insurance program maintained by the California Public Employees’ Retirement System (CalPERS). The court concluded that DOMA fails even rational basis review: “In sum, the legislative record contains evidence of anti-gay animus and the BLAG has failed to establish that § 3 of DOMA is rationally related to a legitimate government interest.” *Id.* at \*14.

Dated: June 4, 2012

Respectfully submitted,

/s/ Amy Whelan

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**CERTIFICATE OF SERVICE**

I, Amy Whelan, hereby certify that a copy of Cross-Claimant Jennifer J. Tobits's "Notice of Supplemental Authority" was served this 4th day of June 2012 upon all counsel via the Court's CM/ECF system. This document is available for viewing and downloading from the CM/ECF system.

/s/ Amy Whelan

Amy Whelan, Esquire